

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEPHEN OMOGBEHIN, . Case No. 06-4581(JEI)
.
v. . 1 John F. Gerry Plaza
. 4th & Cooper Streets
. Camden, NJ 08101
MARIA CINO, Acting .
Secretary, Department .
of Transportation, .
.
Defendant. . February 21, 2008
. 10:31 a.m.

TRANSCRIPT OF STATUS AND DISCOVERY CONFERENCE
BEFORE HONORABLE JOEL SCHNEIDER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: This is the matter of Omogbehin versus
2 Cino, Docket 06-4581. The Court notes that it's now 10:30.
3 This was a scheduled in-court appearance for 10:00. Defense
4 counsel is present on a timely basis. Plaintiff's counsel is
5 not present. We have not -- my chambers has not heard from
6 plaintiff. We tried to call him and had to leave a message on
7 a voice mail. Can we have an entry for the defendant, please?

8 MS. SHELTON: Yes, Your Honor. Assistant United
9 States Attorney Karen Shelton for the defendant.

10 THE COURT: Ms. Shelton, have you heard from Mr.
11 Friedman about today's proceeding, whether he was going to be
12 present or late?

13 MS. SHELTON: No, Your Honor. I actually left him a
14 message early this morning, because I myself didn't realize
15 that there was a conference this morning until about 7:00. So
16 I called him at about 8 or 8:30 to inform -- to remind him, but
17 I don't know whether or not he ever received that message this
18 morning.

19 THE COURT: Was there a problem with notice of this
20 conference?

21 MS. SHELTON: I'm unaware of a problem, Your Honor.
22 I do know that I believe it was your Clerk who called regarding
23 a letter that the parties had submitted about a new discovery
24 dispute, and the Clerk informed me that the Court intended to
25 address it at this regularly scheduled conference and would I

1 please inform plaintiff. I -- when I called -- or when I
2 called Mr. Friedman, I said the Court's not going to give us an
3 additional conference. They're going to deal with it at the
4 regularly scheduled conference at the end of February. He said
5 what is that date? I said I don't know without looking at the
6 order. I'll have to look for it.

7 THE COURT: It wasn't --

8 MS. SHELTON: And that's where I left it. I didn't
9 remind him particularly of that date.

10 THE COURT: Ms. Shelton, it was in the October 22nd,
11 2007 order.

12 MS. SHELTON: Yes, Your Honor, and I have a copy of
13 that order. I presume plaintiff's counsel does as well.

14 THE COURT: Well, I'm not sure it's productive how
15 much we can accomplish today without Mr. Friedman. If you want
16 to make an application for your costs for wasting your time for
17 coming here, that's up to you. I'll certainly entertain it. I
18 read through the letter, and I was prepared to address the
19 issues today. Well, we may have gotten Mr. Friedman on the
20 phone. Let's see what happens here. Hello.

21 MR. FRIEDMAN: Hi, Judge Schneider.

22 THE COURT: Hi, Mr. Friedman. We're in court. We're
23 on the record, and it's about 10:35, and Ms. Shelton is in the
24 court with us. We were expecting you to be here.

25 MR. FRIEDMAN: Judge, I have it in my Outlook

1 calendar for 11:00. I apologize. If -- apparently, I -- oh,
2 gosh. I apologize for not being there. It wasn't that it was
3 intentional. I had it diaried for 11.

4 THE COURT: Are you on your way here?

5 MR. FRIEDMAN: I don't know how my secretary could
6 have made the mistake.

7 THE COURT: Are you on your way here, Mr. Friedman?

8 MR. FRIEDMAN: Right now I'm at Exit 9B of the
9 freeway. I had just come from the New Jersey Superior Court in
10 Atlantic County. I have all the materials ready. I was
11 prepared to be there well before 11:00, which I thought was the
12 scheduled time.

13 THE COURT: You won't be here for another hour. Mr.
14 Friedman.

15 (No verbal response)

16 MR. FRIEDMAN: Hello.

17 THE COURT: Can you hear me, Mr. Friedman?

18 MR. FRIEDMAN: Hello? Hello?

19 THE COURT: Can you hear me, Mr. Friedman?

20 MR. FRIEDMAN: Hello?

21 THE COURT: Well, for the record, Mr. Friedman was on
22 the phone. He said he was at Exit 9B. He said that he
23 intended to be here at 11:00. The Court is very familiar with
24 the New Jersey Turnpike, and the Court estimates that it's
25 approximately at least an hour away. So that the Court does

1 not surmise that Mr. Friedman will get here, if he's on his way
2 here, until at least 11:30. Ms. Shelton, do you have time to
3 stay?

4 MS. SHELTON: Your Honor, I'd be more than happy to
5 stick around until Mr. Friedman shows up, so we can handle this
6 providing it fits with the Court's calendar. I'd prefer to get
7 this out of the way today.

8 THE COURT: I probably -- yes, so would I. I would
9 -- I probably can work it in if you would -- if you could just
10 be a little patient with me while I juggle some things. Let me
11 see this is him on Line 1. Hello?

12 MR. FRIEDMAN: Hi, Judge.

13 THE COURT: Mr. Friedman, are you on your way here?

14 MR. FRIEDMAN: I am the Woodbury/Runnemede exit of
15 the freeway. I had just come from a Superior Court in Atlantic
16 County.

17 THE COURT: Oh, I thought that you were on the New
18 Jersey Turnpike.

19 MR. FRIEDMAN: No. No.

20 THE COURT: You might be here in a half an hour then.

21 MR. FRIEDMAN: I will be there probably within the
22 next 15 minutes.

23 THE COURT: All right. We'll wait for you, Mr.
24 Friedman.

25 MR. FRIEDMAN: Pardon me?

1 THE COURT: We'll be here waiting for you.

2 MR. FRIEDMAN: Okay. Thank you very much. Bye now.

3 THE COURT: Okay. Well, that's good. I thought he
4 was on the New Jersey Turnpike. So if we could just be a
5 little patient, Ms. Shelton, I think we'll be able to work
6 through this, and it sounds like there was an inadvertent error
7 on Mr. Shelton's part, and these sorts of things happen to
8 everyone. You were fortunate that you caught it. Right?

9 MS. SHELTON: Yes.

10 THE COURT: So in that event, I would hope that you
11 would choose not to file a motion for costs.

12 MS. SHELTON: I have no intention of filing any.

13 THE COURT: But I'm not preventing you from doing
14 that. But let's wait until he gets here. We'll juggle a
15 couple of things, work through this, and see if we can get
16 through these discovery issues and get on track in this case.
17 So thank you for your patience, Ms. Shelton. So we're
18 adjourned for the moment while we wait for Mr. Friedman to get
19 here. Thank you, Ms. Shelton.

20 (Recess)

21 THE COURT: This is the matter of -- bear with me.
22 Please excuse me if I mispronounce the name -- Omogbehin versus
23 Cino, Docket 06-4581. Please be seated. Mr. Friedman, I know
24 there was some mixup with the time. There's no question in the
25 Court's mind that you're acting in good faith. It was

1 inadvertent, so forth. These things happen, so I don't want
2 you to lose any sleep over it. Okay?

3 MR. FRIEDMAN: I did figure out the cause. The --
4 this conference had been originally scheduled for December the
5 17th at 11:00 a.m. and --

6 THE COURT: Okay. These things happen, and I'm sure
7 it won't happen again, and you have a very gracious adversary,
8 so let's just move on. What I want to do is I want to address
9 the parties' discovery issues and get a discovery schedule. I
10 do want to say something. I'm probably going to have to take a
11 call in between this, but they shouldn't take long, so bear
12 with me, counsel. Let me just interrupt now. Go off the
13 record. Let me take this call, because we' trying to --

14 (Off the record)

15 THE COURT: We're back on the record. I had to take
16 that phone call. I may have another one at 12. Again, I don't
17 think it will take long. I want to address the parties'
18 discovery issues, but before we get to the substance of the
19 objections and the issues in dispute, I want to make the
20 parties aware that what will guide and override our discussion
21 and the Court's rulings is Federal Rule of Civil Procedure
22 26(b)(2), which deals with limitations on the frequency and the
23 extent of discovery.

24 There is no question that the plaintiff is entitled
25 to relevant discovery in the case. There is no question that

1 plaintiff is entitled to electronic discovery, however, the
2 bounds of discovery are not limitless, and what the rules
3 provide in 26(b)(2)C, the rule states that, "On motion or on
4 its own the Court must limit the frequency or extent of
5 discovery otherwise allowed," and I'm paraphrasing, if the
6 discovery is unreasonably cumulative or duplicative or unduly
7 burdensome, the party has had ample opportunity to obtain the
8 discovery, or, what's particularly relevant to this case, the
9 burden or expense of the proposed discovery outweighs its
10 likely benefit considering the needs of the case, the amount of
11 controversy, the parties resources, the importance of the
12 issues at stake in the action, and the importance of the
13 discovery in resolving the issues. And I just want to remind
14 the parties that the Court intends to keep that limitation in
15 mind when we go through these discovery issues.

16 My general impression of what's happening here is
17 that this search for electronic discovery is overwhelming the
18 case, and it has become a case within a case. Yes, the
19 plaintiff is entitled to electronic discovery, but my general
20 impression -- because we've been here a few times before
21 addressing this -- these issues, and I'm aware of the extent
22 and the detail and the burden and the expense of what's been
23 going on here, my general sense, without getting into specifics
24 is that it's overkill given what we're looking for. So without
25 making any specific rulings, those are my general impressions.

1 So what I want to do is I want to go through the issues in the
2 January 31st letter, see if there's any other issues, and then
3 get a scheduling order that we're going to abide by.

4 MR. FRIEDMAN: May I be heard on some fundamental
5 issue before we get into the specific --

6 THE COURT: What is that, Mr. Friedman?

7 MR. FRIEDMAN: The fundamental issue is an issue of
8 obtaining the actual physical evidence that Mr. Omogbehin had
9 asked for.

10 THE COURT: Okay. Isn't that covered in this letter?

11 MR. FRIEDMAN: That is covered at the outset.

12 THE COURT: So we'll get to it then. Is there
13 anything you want to say as a general matter that's not in this
14 letter?

15 MR. FRIEDMAN: Yes. What I wanted to say is that we
16 had two prior conferences, the first one was on June the 7th,
17 2007, which was more than a half a year ago, and at that
18 conference agency or government's counsel at the time, Mr.
19 Aftab, represented to the Court that he would turn over the
20 backup tape. Had we had the backup tape, we would not be
21 involved in the extent of litigation that we're involved in
22 now. He represented to the Court on Page 8 of the transcript,
23 and I will read --

24 "THE COURT: So what does that have to do with the
25 retrieval of this tape? You have the tape in its -- a original

1 format."

2 MR. FRIEDMAN: And then Mr. Aftab responded --

3 "MR. AFTAB: Yes, that's correct, Your Honor. We did
4 as the plaintiff had requested, period."

5 "THE COURT: And you did copy that for plaintiff?"

6 THE COURT: What -- get to the point, Mr. Friedman.

7 MR. FRIEDMAN: Okay.

8 THE COURT: We have a lot to cover. What's the
9 point?

10 MR. FRIEDMAN: Mr. Aftab represented that he had the
11 tape, and that he would produce the tape for us.

12 THE COURT: Okay.

13 MR. FRIEDMAN: They did not produce the tape. They
14 had produced CDs. These CDs, we contend, do not contain all of
15 the information that is in the backup tape. This case involves
16 a very important matter, which is Mr. Omogbehin's termination.
17 It involves a lot of money to him, and it has turned into a lot
18 of expense for him, not the government but Mr. Omogbehin,
19 because he wanted the physical evidence to show that the
20 reasons why he was terminated were purely, utterly, totally
21 pretextual. The agency gave reasons why he was terminated
22 after seven and a half months. He was the IT Manager. He came
23 into an organization --

24 THE COURT: Mr. Friedman, I don't want to argue the
25 merits of the case. I thought you had something to add that

1 wasn't in your papers. We're going to go to the letter. Okay?
2 So let's put aside the opening statement and closing statement.
3 Let's get to the issues in the letter starting on Page 1.
4 Okay? What's the first issue, Ms. Shelton, that's set forth in
5 the letter.

6 MS. SHELTON: With respect to the general concerns,
7 Your Honor, or do you want to go to the specific concerns --

8 THE COURT: Well --

9 MS. SHELTON: -- which begin on Page 2?

10 THE COURT: Let's go to the specific issues. We've
11 done enough of the general concerns. What is the first issue?

12 MS. SHELTON: With respect to the e-mails of
13 Christian and Smith, who I believe, Your Honor, are H.R.
14 personnel, the plaintiff had requested all e-mails for these
15 individuals, and because these people are H.R. personnel, not
16 every e-mail that goes to them or that they receive can be
17 produced to plaintiff for privacy concerns of the other
18 employees who are not parties to the case.

19 THE COURT: Have you produced all of the e-mails of
20 these two employees relating to the plaintiff?

21 MS. SHELTON: Yes, Your Honor, we have.

22 THE COURT: So is the plaintiff requesting e-mails
23 concerning other employees besides himself?

24 MS. SHELTON: Your Honor, I don't know what the
25 plaintiff is requesting beyond what we've produced.

1 THE COURT: All right. Mr. Friedman, why -- if the
2 defendant has represented that they've produced the e-mails
3 from Christian and Smith regarding the plaintiff, why isn't
4 that sufficient?

5 MR. FRIEDMAN: Because we strongly believe, based on
6 evidence that we already have, that there was spoliation of
7 evidence. The information that the agency claims it had
8 supplied to us came exclusively from the electronically stored
9 information.

10 THE COURT: My question is what is -- you have asked
11 for the e-mails of Christian and Smith regarding employees
12 other than the plaintiff. Is that correct?

13 MR. FRIEDMAN: Yes.

14 THE COURT: My question is what is the relevance of
15 that information?

16 MR. FRIEDMAN: The relevance of this information is
17 to show, number one, that the agency engaged in spoliation of
18 evidence, because there's an absence of information relating to
19 Stephen Omo --

20 THE COURT: So you want to find out about every e-
21 mail that these two employees sent or received in order to
22 prove that there was spoliation?

23 MR. FRIEDMAN: No, that is not what we want to do.
24 We want to show that as Human Resources Specialists, that they
25 regularly work with the management officials who were involved

1 in the actual disciplining of employees. These --

2 THE COURT: So can't you cover that at their
3 depositions?

4 MR. FRIEDMAN: Cover what?

5 THE COURT: This question, how they deal with
6 management --

7 MR. FRIEDMAN: Cover what question?

8 THE COURT: How they deal with management personnel.

9 MR. FRIEDMAN: Yes. No, I think -- we haven't gotten
10 into the fact issues, because we're trying to get the documents
11 first that have been withheld. And the purpose of getting the
12 documents is to show that Human Resources people regularly deal
13 with management personnel, and they communicate via e-mail, and
14 the e-mails show an interaction where they give advice, and
15 they have inquiries from management personnel as to how to deal
16 with problematic employees. There is a total absence of any e-
17 mail information relating Stephen Omogbehin, and we contend
18 that the backup tapes would show that these individuals
19 regularly communicated --

20 THE COURT: We're not talking about backup tapes
21 right now. We're not -- we're talking about e-mails of
22 Christian and Smith.

23 MR. FRIEDMAN: And that goes to the fundamental issue
24 of all of the information that they are supplying is coming
25 from the backup tapes.

1 THE COURT: We'll get to that. We'll get to that.
2 Okay. The Court is prepared to rule on the first issue on Page
3 2 of the January 31st, 2008 letter, Subsection A. Plaintiff
4 has requested all e-mails of Christian and Smith. The Court
5 denies that request as requesting irrelevant information.
6 Clearly, these employees, Christian and Smith, have to produce
7 their e-mails regarding the plaintiff. Ms. Shelton has
8 represented that whatever e-mails are available from these two
9 individuals, Christian and Smith, regarding the plaintiff have
10 been produced. They do not have to produce e-mails regarding
11 employees other than the plaintiff, because they're irrelevant
12 to the issues in the case.

13 MR. FRIEDMAN: May I --

14 THE COURT: No, you not, Mr. Friedman. If plaintiff
15 wants to inquire of the dealings of Christian and Smith with
16 management personnel and what their general practice and
17 procedures were regarding communications with management
18 personnel, he can explore that at the depositions of Christian
19 and Smith. Next issue. We're not going back. We're going
20 forward. Next issue.

21 MR. FRIEDMAN: Your Honor, before we get to the next
22 issue, you're making a ruling. It is my understanding that
23 this is a pre-motion conference and we are -- we have not even
24 filed our motion papers.

25 THE COURT: Mr. Friedman, local rules provide that a

1 motion for discovery cannot be filed without leave of court.
2 The purpose of this letter is to identify and address the
3 discovery issues in the case without the necessity of the
4 motion. You can order a copy of this transcript and do with it
5 as you like. I am making rulings on the discovery issues and
6 disputes between the parties. I've made my ruling on the first
7 issue identified in Subsection A, Page 2 of the January 31st
8 letter. Ms. Shelton, what's the second issue?

9 MS. SHELTON: Your Honor, the second issue was
10 respecting Cleave Laswell, who was responsible for the Lotus
11 Notes administrator who retrieved the backup -- who retrieved
12 information from the backup tape and put it on CD. Plaintiff
13 wanted to know who he worked for and determine the scope of any
14 contract that this employee had with the government, and that
15 individual was recently deposed. And my understanding that
16 that issue is resolved as a result, but --

17 THE COURT: So as far as you're concerned, is this
18 issue moot?

19 MS. SHELTON: It is to me, Your Honor. I don't know
20 how plaintiff feels?

21 THE COURT: Mr. Friedman, the issue identified in
22 Subsection B, Page 3, is that issue moot?

23 MR. FRIEDMAN: No, we don't have the information
24 relating to the scope of any contract pertaining --

25 THE COURT: Did you depose Mr. Laswell?

1 MR. FRIEDMAN: Yes.

2 THE COURT: Did you inquire of him what his job
3 duties were with regard to the retrieval at issue in this case?

4 MR. FRIEDMAN: Yes.

5 THE COURT: Okay, so why do you need the contract?

6 MR. FRIEDMAN: Because the -- he did not give me a --
7 he did not give me any type of specific response to that.

8 THE COURT: Didn't you ask him what he did to
9 retrieve the information you requested?

10 MR. FRIEDMAN: Yes.

11 THE COURT: Okay. The Court rules with regard to the
12 issue identified in Subsection B. That the issue is moot at
13 this point. Plaintiff's request for additional information
14 regarding Mr. Laswell is denied. The plaintiff deposed Mr.
15 Laswell, had every opportunity to ask him about what he did
16 with regard to a search for information relevant to this case.
17 Mr. Friedman has represented he made that inquiry, so
18 additional documentation is not needed in this case since the
19 deposition testimony of Mr. Laswell has already been provided.

20 MR. FRIEDMAN: Your Honor --

21 THE COURT: Next issue.

22 MR. FRIEDMAN: May --

23 THE COURT: Next issue, Mr. Friedman. We're going
24 forward not backwards. Ms. Shelton, what's the next issue?

25 MS. SHELTON: Your Honor, there was -- plaintiff had

1 made a request to produce documents that Shelley Yak had stored
2 on her desktop, that is the hard drive of the computer that
3 sits on her desk as opposed to a network drive, and the
4 defendant had indicated that there were none stored on her
5 desktop. The plaintiff then asked, well, you didn't say
6 whether or not anything was stored on her laptop, to which we
7 responded that there was no laptop. There was only the hard
8 drive desktop.

9 THE COURT: Mr. Friedman, what is it you're
10 requesting from Ms. Yak?

11 MR. FRIEDMAN: There was no response from the agency
12 to my -- from the defendant, to my knowledge, that Ms. Yak did
13 not have a laptop computer.

14 THE COURT: They just represented that.

15 MS. SHELTON: And I believe there was a letter to
16 that effect.

17 THE COURT: Defendant has represented on Page 3 of
18 its letter, "Shelley Yak has no laptop computer, comma,
19 ellipsis with four dots, close quote." Does that -- does that
20 end your inquiry?

21 MR. FRIEDMAN: Page 3 of the letter?

22 (Pause)

23 MR. FRIEDMAN: No, it does not, because we don't know
24 whether at the relevant time period she had a laptop.

25 THE COURT: Ms. Shelton, are you representing that at

1 the relevant time period in this case, while the plaintiff was
2 employed, that Ms. Yak had -- did not have a laptop computer?

3 MS. SHELTON: Yes, Your Honor.

4 THE COURT: Isn't that what you want, Mr. Friedman?

5 MR. FRIEDMAN: Yes.

6 THE COURT: Okay. So that issue is moot. Let's go
7 to the next issue, Subsection D on Page 3. What is the issue
8 here?

9 MS. SHELTON: Your Honor, I need to have a copy of
10 the interrogatories in front of me. This is from the second
11 set. Right? There was more than one.

12 MR. FRIEDMAN: I don't believe there --

13 MS. SHELTON: I believe what -- what plaintiff was
14 seeking was the racial and ethnic breakdown of all of the
15 employees in the unit in which he worked.

16 THE COURT: Okay. What was the name of that unit?

17 MS. SHELTON: ACX-20.

18 THE COURT: ACX-20. And your response is that you
19 have identified the only comparable employee. Right?

20 MS. SHELTON: Yes, Your Honor.

21 THE COURT: Okay. I do have an issue with this, and
22 I want to hear from Mr. Friedman on this, because I don't think
23 a defendant can unilaterally determine who is a, quote/unquote,
24 comparable employee to the plaintiff. Mr. Friedman, I want to
25 hear from you on this issue about what it is you're asking for.

1 (Pause)

2 MR. FRIEDMAN: We're asking for the identity of --
3 the composition of the workforce by numbers of employees in
4 each racial --

5 THE COURT: Okay.

6 MR. FRIEDMAN: -- category.

7 THE COURT: And is this in ACX-20?

8 MR. FRIEDMAN: Yes.

9 THE COURT: Now, what is that? Is that the name of a
10 group?

11 MR. FRIEDMAN: Yes, it's --

12 MS. SHELTON: Your Honor, I was trying to find a
13 schematic. There was a schematic that shows the organizations.
14 This is the organization which plaintiff worked for, and it
15 showed, you know, the chains above it.

16 THE COURT: How big of a group is that, Ms. Shelton?

17 MS. SHELTON: It's my understanding it was like
18 between 20 and 30 people and perhaps plaintiff knows better.

19 MR. FRIEDMAN: Sixty-five people.

20 THE COURT: Sixty-five people. Okay. Now, what was
21 plaintiff's position within this group?

22 MR. FRIEDMAN: He was the IT Manager.

23 THE COURT: Okay. What did this group do? What was
24 the purpose of the group?

25 (Pause)

1 MR. FRIEDMAN: The group managed the network.

2 THE COURT: Okay. Let's go off the record a second.

3 I want to take this call, and after I take this call --

4 (Off the record)

5 THE COURT: We're on the record.

6 MR. FRIEDMAN: To expand on that, they managed the
7 network which includes telecommunications, security e-mail --

8 THE COURT: Okay.

9 MR. FRIEDMAN: -- web services, and database
10 administration.

11 THE COURT: Now, Mr. Friedman, what is the relevant
12 time period that you're seeking information about?

13 MR. FRIEDMAN: The five-year period preceding the
14 date of plaintiff's termination.

15 THE COURT: Plaintiff was terminated when?

16 MR. FRIEDMAN: April 23rd, 2004.

17 THE COURT: Two thousand?

18 MR. FRIEDMAN: Four.

19 THE COURT: Okay, and when did plaintiff start
20 working there?

21 MR. FRIEDMAN: September of 2003.

22 THE COURT: Okay, so plaintiff worked for
23 approximately --

24 MR. FRIEDMAN: Seven and a half months.

25 THE COURT: -- seven months -- seven or eight months.

1 Okay. Ms. Shelton, is this information available? I mean
2 aren't there employment-type statistics that employers are
3 required to prepare?

4 MS. SHELTON: Actually, Your Honor, we're not longer
5 required nor do we collect that information on a mandatory
6 basis, because the collection of that information by itself has
7 been --

8 THE COURT: How long has that been the case?

9 MS. SHELTON: -- has been determined to be
10 discriminatory that we collect such information.

11 THE COURT: How long has that been --

12 MS. SHELTON: So we're sort of in a Catch 22.

13 THE COURT: How long has that been that case?

14 MS. SHELTON: I could certainly find out. I don't
15 know off the top of your head. I know it's been that way for
16 several years.

17 THE COURT: Do you know if that was -- was that the
18 case --

19 MS. SHELTON: I know that partial information would
20 probably be available, and, obviously, if the Court so orders,
21 we would ask the agency's Office of Civil Rights to produce
22 what information they do have.

23 THE COURT: Okay, and what you're interested in, Mr.
24 Friedman, is what? Specifically, what information do you want
25 about the composition of the workforce?

1 MR. FRIEDMAN: The numbers of employees by each
2 racial category, and the number of employees in each national
3 origin category.

4 THE COURT: Well, what are the racial categories and
5 national origin categories that you're interested in? I mean
6 suppose this government doesn't keep those statistics, do you
7 want them to go through every personnel file to see if a person
8 is a Caucasian or an Afro-America or an Indian or some other
9 racial group or national origin group?

10 MR. FRIEDMAN: African-American and Black.

11 THE COURT: Okay. You just want to know how many
12 African-American were employed in this group for the five-year
13 time period that you're talking about.

14 MR. FRIEDMAN: Well, I would also want to know what
15 the overall racial composition is and the national origin
16 composition for the reason that I --

17 THE COURT: Of what? Of this group?

18 MR. FRIEDMAN: Yes.

19 THE COURT: When you say national origin, what are
20 you talking about?

21 MR. FRIEDMAN: Individuals whose places of birth were
22 other than the United States.

23 THE COURT: Are you claiming that that's relevant to
24 the issues in this case?

25 MR. FRIEDMAN: Yes.

1 THE COURT: And you're claiming that the plaintiff
2 was discriminated against because of his national origin?

3 MR. FRIEDMAN: Yes.

4 THE COURT: Because he's what, not a -- not -- from
5 the particular country he's from or -- is that what the claim
6 is?

7 MR. FRIEDMAN: He is from an African nation. He was
8 born in Nigeria. Yes.

9 THE COURT: Is the plaintiff a citizen of the United
10 States?

11 MR. FRIEDMAN: Yes, he is.

12 THE COURT: Ms. Shelton, what I'd like you to do is
13 this. I'd like you -- I am not asking you to go to the
14 personnel files of everyone who worked in this group to try and
15 obtain this information. I'd like you to try and find out if
16 this information is available. Has it been already compiled by
17 the agency. If it has already been compiled, I think it's
18 appropriate to produce those statistics to the plaintiff --

19 MS. SHELTON: For the --

20 THE COURT: -- for the five years that he talked
21 about.

22 MS. SHELTON: For the ACX-20 group, Your Honor?

23 THE COURT: Only the ACX-20 group. I do think that
24 it's important that the plaintiff know how many people were
25 employed in that group, so if you don't have an exact number,

1 someone's going to have to give an estimate. I'm assuming, but
2 I don't know for sure, especially in light of what you said,
3 but I know historically these types of statistics have been
4 kept for private employers. I don't know if they still do it.
5 I don't know if the government did it. But I think it's
6 appropriate to check if the government has these statistics
7 already available just for this group for this five-year time
8 period. And if already in existence, then the Court orders
9 that it be produced.

10 Certainly, you have to identify the number of
11 employees that were in the group. If the statistics are not
12 otherwise available, aside from going to every individual
13 personnel file, then we're going to have to revisit the issue
14 at some time in this case, because I'm hesitant to ask the
15 government to review individual files to compile this
16 information. But if it already is in existence, I think it
17 should be produced. If it's not in existence, we'll address
18 the issue at another conference to discuss what you found out,
19 what's available, and then weigh the burden against the
20 relevance of the information.

21 Okay. That takes care of Subsection D. Now let's go
22 to E on Page 4.

23 MS. SHELTON: Your Honor, I believe that E was simply
24 a documentary request that mirrored Issue Number -- Issue
25 Letter D --

1 THE COURT: Okay, so --

2 MS. SHELTON: -- which was documents reflecting the
3 same thing.

4 THE COURT: Same ruling.

5 MS. SHELTON: Your Honor, just for a point of
6 clarification, all documents relating to that might --

7 THE COURT: No, just the statistics that have already
8 been compiled.

9 MS. SHELTON: Okay, so would a declaration including
10 the statistics suffice? It --

11 THE COURT: Why can't you produce the actual
12 statistics?

13 MS. SHELTON: Well, if the statistics are produced by
14 an H.R. person opening the personnel file and looking and
15 writing it down --

16 THE COURT: But I didn't ask you to do that. Right?

17 MS. SHELTON: Okay.

18 THE COURT: I didn't ask you to do that.

19 MS. SHELTON: So if a document exists that reflects
20 -- that has already been created that reflects the
21 statistics --

22 THE COURT: Produce it.

23 MS. SHELTON: -- that's the document that needs to be
24 produced.

25 THE COURT: Correct.

1 MS. SHELTON: Okay. Thank you, Your Honor.

2 THE COURT: Correct. If, in order to get these
3 statistics, your H.R. person has to go through individual
4 personnel files, that's the issue we're going to have to
5 revisit the next time we get together, because we have to weigh
6 the burden against the relevance of that information. So that
7 takes care of D and E. Now let's go to F on Page 4.

8 MR. FRIEDMAN: F I believe refers to request for
9 production Number 6 as opposed to interrogatory Number 6.

10 THE COURT: Ms. Shelton, what's the issue in F?

11 MS. SHELTON: This -- "The agency did not respond to
12 interrogatory Number 6," is a line that was taken from your
13 letter to me prior to responding. If that was an error, then
14 I've --

15 MR. FRIEDMAN: Yes.

16 MS. SHELTON: -- been chasing the wrong response.

17 MR. FRIEDMAN: There was a typographical error.
18 Request for production Number 6 and 7 were the requests that
19 had not been responded to.

20 MS. SHELTON: Okay, that's the first that I'm hearing
21 of this then.

22 THE COURT: Okay. What is that issue?

23 MR. FRIEDMAN: 6 is product all documents which
24 reflect or represent any formal complaint of discrimination
25 filed under the federal EEO regs by all individuals within the

1 FAA Tech Center who allege race or national origin
2 discrimination within the five-year period preceding the date
3 of plaintiff's termination.

4 THE COURT: Okay. How many people are employed by
5 the FAA Tech Center?

6 MS. SHELTON: Thousands and thousands, Your Honor.
7 This is much larger than the group that he worked for. It
8 includes independent contractors. It includes non-employees of
9 the government.

10 MR. FRIEDMAN: There are not thousands and thousands
11 of employees there, and the independent contractors do not file
12 formal complaints of discrimination under the EEOC regulations.

13 THE COURT: Do you --

14 MS. SHELTON: That he is aware of.

15 THE COURT: What you want to know, Mr. Friedman, is
16 within this five-year time period all complaints of racial or
17 national origin discrimination that were filed?

18 MR. FRIEDMAN: Yes.

19 THE COURT: Now, when you say complaints, what
20 specifically are you looking for?

21 (Off the record)

22 THE COURT: We're back on the record. That's the
23 last phone call interruption I'll have. We're dealing with the
24 FAA -- complaints against the FAA for racial and ethnicity
25 discrimination. What type of complaints are you talking about,

1 Mr. Friedman?

2 MR. FRIEDMAN: There -- federal employees have a
3 specific avenue of redress. These are set forth in regulations
4 of the EEOC. Non-federal employees do not have that avenue of
5 redress.

6 THE COURT: What type of complaints are you asking
7 for?

8 MR. FRIEDMAN: Formal complaints of discrimination.

9 THE COURT: Is there a form?

10 MR. FRIEDMAN: There --

11 THE COURT: You're talking about lawsuits? What are
12 you talking about?

13 MR. FRIEDMAN: There is a process. An employee must
14 first seek pre-complaint counseling. There is a 40-day -- a
15 45-day window for the employee to do that after he perceives
16 that there is discrimination against him. After that period he
17 files a formal discrimination complaint. It's a formal
18 document that's filed, which is officially docketed by the
19 agency. The agency then goes through a processing period.
20 There are -- two thirds of the individuals who are at the FAA
21 Tech Center are not federal employees. The minority of
22 employees at the FAA Tech Center are federal employees. So
23 we're not talking about that large numbers of people.

24 THE COURT: Ms. Shelton.

25 MS. SHELTON: I would just address that perhaps if it

1 had been phrased that way, it would be different. It says --
2 here it didn't say all federal employees within the FAA Tech
3 Center. It said all individuals. So that might have had
4 something to do with the over-breadth objection. However, I do
5 note that RFP Number 6, the defendant -- and this was prior
6 counsel, prior to myself, Your Honor -- had indicated that
7 within his employment group the ACX-1, ACX-1 group that he was
8 a part of, plaintiff was the only one who had filed such a
9 complaint.

10 THE COURT: Is that the ACX-20 group?

11 MS. SHELTON: No, I believe the request --

12 THE COURT: What's the difference between ACX-1 and
13 ACX-20?

14 MS. SHELTON: ACX --

15 MR. FRIEDMAN: AC --

16 MS. SHELTON: ACX-20 is the smaller subgroup of which
17 the plaintiff was as part.

18 THE COURT: Okay.

19 MS. SHELTON: ACX-1 is a larger subgroup in that same
20 chain of command. The FAA Tech Center is the largest of all
21 the subgroups we're talking about.

22 THE COURT: How many people are employed in ACX-1?

23 MS. SHELTON: That I'm -- off the top of my head,
24 Your Honor, I'm not familiar with that.

25 THE COURT: Do you know, Mr. Friedman?

1 MR. FRIEDMAN: I would guess a few hundred people
2 maybe. A hundred. A hundred people possibly.

3 THE COURT: Okay.

4 MS. SHELTON: And it's my understanding, Your Honor,
5 that within that ACX-1 group, that larger group, but which is a
6 subset of the larger center, that plaintiff was the only one
7 who had filed such a complaint.

8 THE COURT: In the ACX-1 group or the ACX-20 group?

9 MS. SHELTON: According to this response, the ACX-1
10 group.

11 THE COURT: For what time period?

12 MR. FRIEDMAN: Where -- which one are you referring
13 to?

14 MS. SHELTON: I'm looking at the response RFP Number
15 6.

16 MR. FRIEDMAN: Number 6.

17 MS. SHELTON: There is an objection, and then beyond
18 the objection on the following page, "There is none for OTA, in
19 parentheses, ACX-1, probationary employees other than
20 plaintiff."

21 THE COURT: Well, was that limited to just
22 probationary employees?

23 MS. SHELTON: I will confirm that fact, but my
24 understanding is that it was plaintiff alone. But I can
25 confirm that fact.

1 THE COURT: The answer, it might a little bit
2 ambiguous about that.

3 MR. FRIEDMAN: Your Honor, I am representing an
4 individual now in Federal District Court here in Camden who was
5 a black male, who was terminated during his probationary
6 period. He was the -- he was the Public Relations Officer.

7 THE COURT: For what, the FAA?

8 MR. FRIEDMAN: At the FAA Tech Center.

9 MS. SHELTON: Your Honor, I believe that individual
10 is identified in plaintiff's responses to a different request.

11 THE COURT: Mr. Friedman, why are you raising that?

12 MS. SHELTON: And that is D -- our response to D --

13 MR. FRIEDMAN: D of what?

14 MS. SHELTON: -- which was, "Furthermore, defendant
15 identified Reynold McPherson." Is that the individual which
16 you --

17 MR. FRIEDMAN: No.

18 MS. SHELTON: -- were speaking of?

19 MR. FRIEDMAN: No. No, there would be -- the point
20 I'm trying to make is that the Human Resources function
21 provides advice and guidance to management officials at the FAA
22 Tech Center. Mr. Omogbehin happens to be in a relatively small
23 sub-component of a larger group. His allegation is that there
24 is a discriminatory mind set. There is a atmosphere of animus
25 against African-Americans, and that's reflected in the fact

1 that only those individuals or a disproportionately number of
2 those individuals have been terminated during their
3 probationary periods, and in order to establish that, we've
4 asked this interrogatory. I would guess that in terms of
5 employees who were terminated at the entire FAA Tech Center
6 during their probationary period, that the numbers would be
7 incredibly small.

8 THE COURT: Okay. I'm not sure what request we're
9 now talking about. Let's get back on focus here. I thought we
10 were up to F, and that there was apparently some sort of
11 typographical error, and we're no longer talking about
12 interrogatory Number 6. So what alleged deficiency are we
13 addressing now?

14 MR. FRIEDMAN: We are talking about request for
15 production Number 6, I believe, and we're asking --

16 MS. SHELTON: Which is not addressed in this
17 letter --

18 THE COURT: Right.

19 MS. SHELTON: -- so the Court wouldn't be familiar --

20 THE COURT: Right.

21 MS. SHELTON: -- with what the request was.

22 THE COURT: Right. And --

23 MR. FRIEDMAN: Right. I had --

24 THE COURT: That's fine. That happens, Mr. Friedman.

25 MR. FRIEDMAN: -- mistakenly referred to it. Okay.

1 THE COURT: And what request 6 is, all complaints of
2 discrimination regarding ethnicity and national origin to the
3 FAA?

4 MR. FRIEDMAN: FAA Tech Center, but I'm -- I am --
5 when I said filed pursuant to 29 CFR Part 16.14, the only
6 individuals who would have standing to do that are federal
7 employees.

8 THE COURT: 29 CFR --

9 MR. FRIEDMAN: Part 16.14. Those are the regulations
10 promulgated by the EEOC which sets forth the procedure by which
11 a federal employee can raise a Title 7 matter.

12 THE COURT: Ms. Shelton, are those -- is that
13 information available, the identity of the individuals who
14 filed race and national origin discrimination complaints
15 pursuant to 29 CFR 16.14 for the five years that Mr. Friedman's
16 talking about? Is that available?

17 MS. SHELTON: Your Honor, because this is the first
18 time I'm hearing of it, I hesitate to answer without having
19 accurate information.

20 MR. FRIEDMAN: I --

21 MS. SHELTON: I don't know if what he's looking for
22 are numbers, names. I don't know how the -- if these files are
23 kept within their official personnel file, whether there is a
24 privacy issue with that for the individuals who chose not to go
25 forward with say a District Court complaint. I would just

1 hesitate to say what I could or couldn't produce without
2 talking to the agency.

3 MR. FRIEDMAN: As --

4 THE COURT: Okay. Now what is it you want from these
5 individuals, Mr. Friedman?

6 MR. FRIEDMAN: I had wanted all formal complaints
7 filed by individuals who had alleged that they were
8 discriminated against either based on their race or their
9 national origin.

10 THE COURT: What I'd like you to do, Ms. Shelton, is
11 investigate whether information is available about who and how
12 many of these individuals filed these race and national origin
13 complaints against the FAA regarding twenty -- pursuant to 29
14 CFR 16.14. And the next time we get together we'll readdress
15 this issue and determine what, if anything, has to be produced.

16 MS. SHELTON: Your Honor, I have two questions. One,
17 you want those who filed formal EEO complaints not just those
18 who sought EEO counseling.

19 MR. FRIEDMAN: Correct.

20 MS. SHELTON: Is that correct?

21 MR. FRIEDMAN: Correct.

22 MS. SHELTON: Okay.

23 MR. FRIEDMAN: That is correct.

24 MS. SHELTON: And two, when you say who and how many,
25 are you looking for names specifically, or are you looking for

1 race and national origin?

2 THE COURT: Well, these are individuals who filed
3 race and national origin complaints. Before we get into
4 whether any additional information, see if you can identify the
5 names of these people and how many were filed, if any, and then
6 we can discuss what information, if any, has to be produced
7 regarding the complaints. But until we have a handle on what
8 we're talking about, I think it's premature to make a
9 determination of what has to finally be produced. So defendant
10 will look into this issue as they will look into the other
11 issue we identified, statistics and Subsection D and E, and
12 we're going to revisit those issues next time we get together.
13 Let's go to G.

14 MR. FRIEDMAN: G is request for production Number 7,
15 which Ms. Shelton did not address, because I had mistakenly
16 referred to it as interrogatory Number 7.

17 THE COURT: And what is Request 7?

18 MR. FRIEDMAN: We were also requesting documents
19 which concern employees' complaints of discrimination that were
20 filed outside of the formal EEO process. So that, for
21 instance --

22 THE COURT: Lawsuits?

23 MR. FRIEDMAN: Lawsuits or if an employee were part
24 of a union and --

25 THE COURT: Okay. Let's limit request for production

1 to lawsuits -- just lawsuits. The same thing, Ms. Shelton.
2 Just see if you can obtain how many and who, and next time we
3 get together we'll discuss what, if any, information regarding
4 these complaints have to be -- has to be produced.

5 MS. SHELTON: Your Honor, any lawsuits based on what,
6 not Title 7, on something --

7 THE COURT: No, lawsuits regarding race and ethnicity
8 discrimination not Title 7. Just race discrimination and
9 national origin discrimination. Those were the claims in the
10 complaint.

11 MS. SHELTON: I understand. I just want it
12 clarified, because I believe Mr. -- I don't want to produce
13 something or bring something that he's not expecting. I
14 believe he indicated he's also looking for, as an example,
15 union grievances --

16 THE COURT: No, I think that's over broad.

17 MS. SHELTON: -- in which these were also alleged.

18 THE COURT: We're not going to produce that. You
19 don't have to look into that.

20 MS. SHELTON: Okay, so this --

21 THE COURT: Limit it to formal civil lawsuits.

22 MS. SHELTON: That would be a subset of the prior
23 issue we just talked about.

24 THE COURT: Correct.

25 MS. SHELTON: Okay, so any of those that went on to a

1 further District Court complaint. Okay.

2 THE COURT: Okay. What is the issue in Subpart H,
3 Ms. Shelton, on Page 5?

4 MS. SHELTON: Request for production Number 8.

5 (Pause)

6 MS. SHELTON: Your Honor, generally, one of over
7 breadth, and perhaps plaintiff can help clarify specifically
8 what it is that he's seeking.

9 THE COURT: What are you seeking, Mr. Friedman, in
10 Request 8?

11 MR. FRIEDMAN: We're seeking documentation to show
12 that the termination of the plaintiff obviously was pretextual.
13 All of the information that we're seeking deals with that, and
14 it's very difficult to --

15 THE COURT: So tell me what you're asking for in
16 Request 8.

17 MR. FRIEDMAN: We're asking for documents relating to
18 employees who were either terminated or who resigned after
19 being informed they were going to be subject to discipline
20 which could have led to termination.

21 THE COURT: Plaintiff's request for this information
22 is denied. It's overkill as far as the Court concern. Its
23 relevance is outweighed by its burdensomeness. Its relevancy
24 is questionable. And we've already talked about investigating
25 lawsuits and claims, and in the Court's view, exercising its

1 discretion, not sufficient.

2 MR. FRIEDMAN: May --

3 THE COURT: Let's go on, Mr. Friedman.

4 MR. FRIEDMAN: May I be heard --

5 THE COURT: I don't want to go back.

6 MR. FRIEDMAN: -- at the least to argue why it's --

7 THE COURT: Mr. Friedman, I'm not going back.

8 MR. FRIEDMAN: -- why it is --

9 THE COURT: Mr. Friedman, listen to me. I make my
10 ruling. We're not going back. We're going forward.

11 MR. FRIEDMAN: Okay.

12 THE COURT: Request --

13 MR. FRIEDMAN: Your Honor, I only ask that prior to
14 making a ruling could I be heard? This -- it appears as though
15 you're making important decisions concerning my client's need
16 or belief that he needs certain information, and I have not
17 been able to express why. You had asked me what I was asking
18 for. You hadn't asked me why I was asking for it and the
19 relevance of what --

20 THE COURT: I understand, Mr. Friedman. I understand
21 why you're asking for this information.

22 MR. FRIEDMAN: Could you --

23 THE COURT: I hear your state --

24 MR. FRIEDMAN: Could you explain to me why then?

25 THE COURT: Mr. Friedman, I made my ruling. I said

1 it many, many times on the record. After I make my ruling,
2 we're not going back and rearguing the point. We're going
3 forward.

4 MR. FRIEDMAN: Your Honor, I am not arguing with
5 that.

6 THE COURT: Okay. Let's take --

7 MR. FRIEDMAN: I only --

8 THE COURT: Let's take a recess for five minutes.
9 Mr. Friedman, compose yourself. I ask that you think about
10 what you're saying, and we'll come back and finish this
11 argument. We'll adjourn for five minutes.

12 (Recess)

13 THE COURT: We're up to --

14 MS. SHELTON: I believe it was I, Your Honor.

15 THE COURT: I'm a little confused now. We did -- did
16 we do H?

17 MS. SHELTON: Your Honor, made a ruling with respect
18 to H, which plaintiff's counsel --

19 THE COURT: Is that where I denied the request?

20 MS. SHELTON: Yes, Your Honor.

21 THE COURT: Okay. We're up to I. What is the issue,
22 Ms. Shelton?

23 MS. SHELTON: I believe it is the same issue as H
24 limited to the subset of probationary employees for all the FAA
25 Tech Center.

1 THE COURT: And what is it that the plaintiff is
2 asking for?

3 MS. SHELTON: Apparently, all documents relating to
4 people who were terminated or resigned after threat of
5 termination.

6 THE COURT: Request denied for the same reasons as
7 Request 8.

8 MR. FRIEDMAN: Your Honor, since it was I who had
9 requested the conference, the cause of the dispute that I tried
10 to resolve, I would ask the Court's permission to have me
11 explain the request and the purpose for the request.

12 THE COURT: Isn't Request -- isn't request for
13 documents Number 9 a subset for documents Number 8?

14 MR. FRIEDMAN: No, it's -- it is a request to show
15 that Mr. Omogbehin's letter of termination did not contain any
16 specifics whatsoever. The purpose is to show that when the
17 agency -- when the FAA Tech Center terminated all other
18 employees, it gave specific reasons, which would indicate that
19 there was a pretextual reason to get rid of Mr. Omogbehin. And
20 that was the purpose for the request for -- the request for
21 production Number 8, also, to show that the agency didn't have
22 a valid reason. It only had a pretextual reason.

23 So in order to justify the termination of Mr.
24 Omogbehin, which it could've done during the probationary
25 period it merely had to send him a letter saying we no longer

1 need your services without any explanation at all. And it's
2 Mr. Omogbehin's contention that the agency -- that he was
3 treated differently from everyone else who was terminated under
4 the same circumstances where they got letters of explanation,
5 they were told that they had performance deficiencies, that
6 they had problems.

7 THE COURT: Okay. The Court determines that
8 plaintiff's request Number 8 and Number 9 is denied. The Court
9 believes it's overkill. This issue can be explored with the
10 defendants' witnesses at their depositions. You can inquire of
11 the relevant employees from defendant why they said what they
12 said in their letters of termination, or probation or what have
13 you, why they didn't say what they said -- why they didn't say
14 something else in their letters, whether other employees were
15 given more detailed letters, whether there was any type of
16 policy or procedure that when they sent letters of that type
17 they had to provide more detail. The Court denies the request
18 for documents in request Number 8 and 9. We're up to J. What
19 is the issue here, Ms. Shelton?

20 MS. SHELTON: Your Honor, this is the issue of the
21 tape.

22 THE COURT: Okay. Let's hear some argument on this.
23 What is the defendants' position with regard to this issue?

24 MS. SHELTON: Specifically, with response to Issue J
25 which says the agency did not respond to a request for

1 production Number 10. A request for production Number 10 asks
2 for a copy of the backup tape containing the e-mail files for
3 Thomas Christian, Alan Cannazarro, Ron Smith and Cindy Kaiser
4 Ellis, and to identify the Lotus Notes administrator that was
5 responsible for retrieving the data from the backup tape.

6 THE COURT: Okay.

7 MS. SHELTON: That was the request. And the
8 defendants --

9 THE COURT: So the plaintiff want --

10 MS. SHELTON: I'm sorry.

11 THE COURT: Plaintiff wants the backup tapes for
12 these individuals that you've identified.

13 MS. SHELTON: That he has identified.

14 THE COURT: That he has identified.

15 MS. SHELTON: Yes.

16 THE COURT: And are these individuals relevant to his
17 termination decision?

18 MS. SHELTON: Yes, Your Honor. But defendants'
19 response was that the tape itself -- there is not a tape for
20 each file for each person. There is one tape on which all of
21 the files of all of the employees of the Tech Center is
22 located. And because of the Privacy Act, relevancy and
23 security concerns they could not produce that tape itself, and
24 so the Lotus Notes administrator who was recently deposed by
25 plaintiff's counsel took that tape, loaded it onto the system,

1 and then downloaded the files for each of these individuals
2 onto a disk.

3 Then the agency counsel, because these are HR
4 representatives, three of these four named individuals are HR
5 representatives, agency counsel reviewed the e-mails on those
6 CDs of Thomas Christian, Alan Cannazarro, and Ron Smith, I
7 believe, who are HR individuals, reviewed those for privacy
8 concerns, anything related to Mr. Omogbehin versus things that
9 were not related to him that were private information in
10 correspondence between non-witnesses, people not related to
11 this case and HR. And I believe that agency counsel testified
12 that there were several hundred e-mails of these people on the
13 files of which a very small number were produced because those
14 were the numbers that were related to Mr. Omogbehin.

15 So, this specific request asked for the tape itself
16 regarding these four individuals to which we've explained it's
17 physically impossible to produce a tape. To the extent that
18 we've produced these on CD, plaintiff's counsel believes that
19 we may have withheld things that were related or that we may
20 have hidden, I believe, or not produced all the relevant
21 evidence. We did produce agency counsel to be deposed on what
22 he produced and what he didn't to try and satisfy that
23 obligation. He wasn't inquired of that.

24 If plaintiff's counsel still believes that something
25 has been withheld we would be willing to produce all of the

1 e-mails to the Court, in-camera, to determine whether or not we
2 have made a full production. I'm not inclined to give all of
3 the HR e-mails to plaintiff. I don't believe I can do that.

4 THE COURT: We'll hear from the plaintiff, but let me
5 make sure I understand the defendants' position. The
6 defendants' position is that there's not a separate backup tape
7 for each of these employees, that there's a general backup tape
8 which would include not only these identified employees, but
9 other employees not relevant to this case.

10 MS. SHELTON: That's correct, Your Honor.

11 THE COURT: That rather than produce the general
12 backup tape the defendant undertook to download to disks the
13 e-mails from these identified individuals from the backup
14 tapes, and then someone checked those e-mails from these
15 identified individuals to identify those that related to this
16 plaintiff.

17 MS. SHELTON: That's correct.

18 THE COURT: And they were produced to the plaintiff.

19 MS. SHELTON: That's correct, Your Honor.

20 THE COURT: Let's hear plaintiff's position.

21 MR. FRIEDMAN: The defendants' position is not what
22 it had represented when it responded to the request for
23 production. The defendants' response was not a response, but
24 was an objection. The sum total of the objection was,
25 "Defendant objects to this request because it's not likely to

1 lead to discoverable information to relevant claims or defenses
2 of any party. Further, defendant objects because it is unduly
3 burdensome."

4 MS. SHELTON: There is a further response to that.

5 THE COURT: Okay.

6 MR. FRIEDMAN: Oh, I'm sorry.

7 THE COURT: Talk to the Court. Mr. Friedman, what I
8 would like to focus on is, what do you want that you have not
9 already received?

10 MR. FRIEDMAN: We have not gotten the backup tape
11 which is the crucial piece of evidence. All of the
12 electronically stored backup information has never been
13 produced. The agency has represented that it has transferred
14 information from this physical, relatively small electronic
15 media into CDs which it has given to Mr. Omogbehin. Mr.
16 Omogbehin contends that the information that was contained on
17 CDs was not the complete information on the backup tape.
18 Moreover --

19 THE COURT: What's the basis for saying that?

20 MR. FRIEDMAN: There were subdirectories in his own
21 file which were empty. There was a representation at a
22 deposition that a mirror image of his hard drive was made when
23 he actually wanted a -- to have a mirror image of his hard
24 drive. The CD did not contain a mirror image.

25 THE COURT: I thought we're talking about the e-mails

1 of not the plaintiff. Right now we're talking about e-mails of
2 other individuals.

3 MR. FRIEDMAN: Yes.

4 THE COURT: Let's talk just about that.

5 MR. FRIEDMAN: Okay. May I explain? It's very
6 difficult to give a fast food version, but generally there is
7 one backup tape that contains all of the e-mails of the FAA
8 Tech Center employees, anyone at the FAA Tech Center who has
9 communicated.

10 THE COURT: Right. So you would acknowledge that
11 that backup tape contains a multitude of completely irrelevant
12 information to this case?

13 MR. FRIEDMAN: Yes. And we have asked for the backup
14 tape so that we could extract from the backup tape, using our
15 experts. We have requested to extract the electronically
16 stored information relating to not only these individuals, but
17 to Mr. Omogbehin, Shelly Yak, Robert Lynn, Gary Albert and a
18 whole host of other individuals who --

19 THE COURT: Do you have any reason to believe that
20 the efforts that the defendant undertook to download from the
21 backup tapes the information you requested was not done? And
22 didn't you depose someone on that?

23 MR. FRIEDMAN: Yes. You asked two questions. Yes,
24 we had deposed someone. And yes, we do believe that there was
25 information that was not given to us from the backup tapes.

1 And the backup tapes were missing archival information. Not
2 only that, but there was a backup in the network system that
3 was never preserved or the agency has not produced that
4 information. At the outset of the litigation Mr. Omogbehin,
5 without presence of counsel, because of his belief that his
6 termination was unfair, did what us lawyers refer to as
7 preparing a litigation hold letter. And I referred to that in
8 the last two sessions that we had --

9 THE COURT: Stay there. Stay there.

10 MR. FRIEDMAN: Mr. Omogbehin was terminated on April
11 the 23rd, 2004. On April the 27th he sent essentially a
12 litigation hold letter because he was escorted out of the
13 facility --

14 THE COURT: Okay.

15 MR. FRIEDMAN: -- without any forewarning, without
16 any opportunity to take whatever materials he felt was
17 important.

18 THE COURT: Okay. So, you're claiming that -- are
19 you claiming that there were e-mails from the plaintiff that
20 were not produced?

21 MR. FRIEDMAN: Yes. Yes.

22 THE COURT: Well, then file a spoliation motion.

23 MS. SHELTON: Your Honor --

24 MR. FRIEDMAN: And that -- in order to confirm that,
25 the backup tapes --

1 THE COURT: Mr. Friedman, simply based on your
2 client's belief that he didn't get everything he was supposed
3 to, I can't order the defendant to produce its backup tapes for
4 thousands of employees that have nothing to do with this case.
5 They have represented that they have backed up to disks the
6 information on the backup tapes from these HR people that
7 you've asked about. That they have backed up to these disks
8 all the information on the backup tapes regarding the
9 plaintiff. Simply based on your supposition that they didn't
10 do a complete job, I'm not going to order that they produce
11 this multitude of irrelevant information, private information,
12 for your client to review.

13 MR. FRIEDMAN: We are not interested in the multitude
14 of private information that's not related to this case.
15 There's one backup tape and the backup tape -- in the
16 electronic world we have the ability to be able to extract
17 information that is relevant to a particular issue. For
18 instance, we all know how to access WestLaw if we're doing
19 legal research. We don't have to look through every type of
20 court reporter system in every state, in every federal
21 jurisdiction in order to do a search. It is the same with
22 backups. There are differential searches, there are ways to
23 extract information from backup tapes.

24 THE COURT: Okay. So, is it your position that your
25 expert -- is your expert the plaintiff or somebody else?

1 MR. FRIEDMAN: No. We --

2 THE COURT: You have an outside expert.

3 MR. FRIEDMAN: Yes.

4 THE COURT: Okay. So, is it your position that your
5 outside expert can take this tape -- what do they do with it,
6 do they download it into your computer?

7 MR. FRIEDMAN: No. They would create a virtual
8 environment which is identical to the environment at the FAA --

9 THE COURT: And how long does that take?

10 MR. FRIEDMAN: The -- a matter of hours.

11 THE COURT: Can that be done in this courtroom?

12 MR. FRIEDMAN: Yes.

13 (Attorney/client conversation)

14 MR. FRIEDMAN: Okay. It would have to be done in a
15 network environment so that, for instance, if the expert were
16 to enter the premises of the FAA and under the aegis of the FAA
17 and perhaps the Court even, the backup could be performed.

18 THE COURT: Ms. Shelton.

19 MS. SHELTON: Your Honor, there are several issues
20 raised by this. I'm not quite sure where to start. With
21 respect to what plaintiff's counsel has most recently discussed
22 and how certain files from this tape can be downloaded and
23 extracted, what he is describing is the exact process that
24 Cleave Laswell undertook at the FAA with this backup tape.
25 Cleave Laswell was deposed by plaintiff's counsel regarding his

1 efforts and what he physically did to do this. And essentially
2 what plaintiff's saying is, well, we've heard you, you've told
3 us how you did, we don't trust you anyway, we want our own
4 people to do it. So, that's one issue. Exactly what he's
5 asking for has already been done.

6 The second issue, there's no way the FAA Tech Center
7 who's responsible for computer support for, at a minimum, you
8 know, every airport traffic control center in the country is
9 going to let a non-employee who's not been screened for
10 security come in and play with their computers. It's simply
11 not something that can happen, physically. To the extent that
12 he's looking for his people to watch our people do the
13 extraction again because he doesn't believe that we did it
14 right the first time, that's something I'd be willing to
15 discuss with the agency. But, again, it involves a non-secure,
16 non-authorized, unscreened person coming in and taking a look
17 at our system, which frightens me, frankly.

18 Second of all, we have admitted that we did not
19 produce everything from those files. So, we've stated that
20 there were hundreds -- in the depositions that plaintiff took,
21 there were hundreds of e-mails for these four people that were
22 downloaded to these disks for which agency counsel then
23 reviewed and only physically produced the ones that related to
24 Mr. Omogbehin. So, even if this extraction is done again by us
25 under their supervision, by them, by the Court, by anyone else,

1 there will be again those several hundred e-mails downloaded to
2 disks and we're still left with the situation that there are
3 relevant -- irrelevant private e-mails of other individuals.
4 We've already got those disks --

5 THE COURT: I understand.

6 MS. SHELTON: -- I'd be happy to submit those to the
7 Court for in-camera review.

8 THE COURT: No. Mr. Friedman --

9 MS. SHELTON: We admit that we have not produced all
10 of those e-mails with respect to these four.

11 THE COURT: -- you deposed this gentleman, did you
12 identify deficiencies in his procedure, or is it you just want
13 to double check what he did?

14 MR. FRIEDMAN: No. He had indicated that he had
15 performed a mirror image. He had created a mirror image of --

16 THE COURT: Okay, here's what we're going to do. Mr.
17 Friedman, I am granting the plaintiff leave to file a motion
18 regarding this backup tape issue. I don't completely
19 understand it. Each of you should have an opportunity to
20 respond to each other's arguments. It seems to be an important
21 issue as far as you're concerned. I think we need additional
22 briefing and additional factual support on this issue. So, you
23 are granted leave to file a motion to compel regarding your
24 request for the backup tapes and information on the backup
25 tapes. We'll circle back at the end of this conference and

1 talk about timing, when you're going to do that.

2 MR. FRIEDMAN: There are --

3 THE COURT: Yes, Ms. Shelton.

4 MS. SHELTON: I'm sorry. With respect to this
5 motion, it raises another point that I had not addressed which
6 is there is some confusion of the issues. This production for
7 documents refers to the backup tape for the Lotus Note system.

8 THE COURT: Okay.

9 MS. SHELTON: Then I have also heard plaintiff's
10 counsel speak about the mirror image of his hard drive which is
11 there are three places -- and this was all covered in the
12 recent depositions -- three places where e-mails could have
13 been stored, one of which is this Lotus Notes backup tape.
14 That's my understanding of what this dispute was about. There
15 is also his hard drive, his physical computer where he could
16 have downloaded them to his hard drive as opposed to having
17 them being stored on the Lotus Notes system.

18 There is also a backup tape that backs up, not just
19 the e-mail, but everything in case the FAA had a terrible
20 blackout, was destroyed by some act of God. We have tapes that
21 backup all the work on this system, not just e-mail, but your
22 Word Perfect, everything, which are sent off-site and preserved
23 for a period of time and then recycled. So, there are three
24 areas where these e-mails are stored. This was all discussed
25 in depositions. The Court's not familiar with it because we

1 haven't addressed it here. But, I want to make sure that I'm
2 clear on what the motion is regarding, because it's our
3 understanding that this request for production, Number 10, was
4 with respect to the backup tape of the Lotus Note system which
5 is what the discussions have been about. To the extent he's
6 seeking --

7 THE COURT: I'd like to make it easy. Any issue
8 regarding backup tapes may be the subject of your motion, Mr.
9 Friedman. Nothing else unless I specifically grant leave. The
10 Court believes that to date thus far in this argument it has
11 sufficient information to rule on the issues I ruled. I'm not
12 going back on those rulings. But, with this issue regarding
13 backup tapes and requests, I'm not comfortable that I
14 understand the issue well enough to make a ruling. So, Mr.
15 Friedman, you can file a discovery motion regarding any request
16 for information that involves backup tapes, whether it be the
17 Lotus Notes, the hard drive or this other backup system.

18 Let's go on because maybe some of the other issues
19 that are in this letter also involve the backup issue. K, Ms.
20 Shelton, what's issue K on Page 6?

21 MS. SHELTON: Plaintiff was seeking that defendant
22 produce all copies of documents -- of all documents including
23 agency manuals, policies, procedures, directives -- there's
24 other things -- which describe the performance management
25 system, including, but not limited to description, purpose,

1 implementation, management, responsibilities, documentation,
2 et cetera.

3 THE COURT: What is it you want, Mr. Friedman?

4 MR. FRIEDMAN: There are agency policies, written
5 authorities, rules, regulations relating to disciplining of
6 employees, treating problematic employees, what actions can be
7 taken against problematic employees.

8 THE COURT: Do those written rules exist with regard
9 to probationary employees?

10 MS. SHELTON: Well, Your Honor, I believe -- I think
11 we've subsequently produced some documents that I believe are
12 in the nature of what he is looking for. We would still object
13 to these as relevant because he was a supervisory employee to
14 which these didn't apply, but --

15 THE COURT: Supervisory or probationary?

16 MS. SHELTON: He was both.

17 THE COURT: Okay.

18 MS. SHELTON: He was a supervisor, but he was under a
19 probationary period.

20 THE COURT: You only have to produce the written
21 documents regarding the plaintiff's position, none other.

22 MS. SHELTON: Regarding?

23 THE COURT: The plaintiff's position. Probationary
24 supervisor position that the plaintiff was in.

25 MS. SHELTON: We have produced his specific

1 performance plan.

2 THE COURT: Are there procedures regarding the
3 discipline of probationary supervisors?

4 MR. FRIEDMAN: Your Honor, I don't believe that there
5 is a subcategory in any of the literature dealing with
6 probationary supervisors. Normally, the categories are
7 probationary employees which don't enjoy the same procedural
8 rights as employees who are not --

9 THE COURT: Okay. That's fair. Is there written
10 documentation regarding the discipline system for probationary
11 employees that would include the plaintiff?

12 MS. SHELTON: Your Honor, because he was a
13 supervisory employee, I believe we would say, no. My
14 understanding is no, that there is a system for the review and
15 evaluation. There are procedures regarding non-management
16 employees, and I believe that's what I produced to Dennis since
17 this letter was submitted to the Court.

18 THE COURT: Okay. That's all I'm directing the
19 defendant to produce any written disciplinary procedures that
20 would apply to the position plaintiff held when he was
21 employed.

22 MR. FRIEDMAN: Your Honor, may I just very briefly
23 say, Ms. Shelton has made a representation that I do not
24 believe is supported. I don't believe there are any federal
25 rules relating to probationary supervisory employees which are

1 any different from probationary non-supervisory employees. The
2 rules relate to probationary employees and that there is no
3 distinction within that general category.

4 THE COURT: Okay. Maybe you didn't hear my direction
5 or order, Mr. Friedman. I'm ordering the defendant to produce
6 the written policies and procedures that pertain to discipline
7 for the position that plaintiff held; so, anything that would
8 address plaintiff's position. It doesn't have to be specific
9 to a supervisor so long as it pertained to plaintiff's
10 position.

11 MR. FRIEDMAN: Could I ask for clarification. By the
12 term "position", do you probationary status?

13 THE COURT: No, the job he held. Whatever job he
14 held.

15 MR. FRIEDMAN: My understanding is that there are no
16 regulations or rules addressing disciplining of people in a
17 certain type of job. That there's a broad policy and the
18 policy pertains to either probationary employees or employees
19 who are --

20 THE COURT: So, if there is a policy that pertains to
21 discipline for probationary employees, wouldn't that also apply
22 to plaintiff's position?

23 MR. FRIEDMAN: Yes.

24 THE COURT: And that's what I ordered to be produced,
25 Mr. Friedman, if it pertains to plaintiff's position.

1 MR. FRIEDMAN: You mean status. Do you mean status?

2 THE COURT: I think position would include his
3 status.

4 MR. FRIEDMAN: So, then -- and I apologize for being
5 thick about this, but in that request that you are making of
6 the defendant you are ask -- that would include any written
7 authority relating to discipline as it pertains to probationary
8 employees such as Mr. --

9 THE COURT: Only pertaining to the plaintiff. If
10 there's a probationary policy for a pilot that would not
11 pertain to your client, that does not have to be produced. If
12 there's a probationary policy for someone in the plaintiff's
13 position, it has to be produced. My ruling is clear. Let's
14 move on. L; Page 6. What's the issue, Ms. Shelton?

15 MS. SHELTON: All documents -- plaintiff had
16 requested that defendant produce all documents, including
17 agency manuals, policies, procedures, et cetera, which
18 represent all policies for storing, retrieving, accessing,
19 retaining and disposing of records in the category within the
20 system of records pertaining to the disciplining of employees.

21 THE COURT: You want the record retention policies
22 for discipline records?

23 MR. FRIEDMAN: Yes.

24 THE COURT: Do they exist, Ms. Shelton?

25 MS. SHELTON: I believe -- I'm sorry, I'm looking at

1 the request for production. Our response was that there was no
2 such written policy, but that HR certainly could be deposed
3 about their practices.

4 THE COURT: Okay. So you're representing that those
5 written policies do not exist.

6 MS. SHELTON: Yes, Your Honor.

7 THE COURT: I can't order them to -- Mr. Friedman, I
8 can't order the defendant to produce documents that don't
9 exist.

10 MR. FRIEDMAN: Obviously, that is a tautology, or
11 it's an immutable truth that something that does not exist
12 cannot be produced. But, the underlying premise, I do not
13 believe, is correct.

14 THE COURT: Okay. Do you know what I do in
15 situations like that, because this is not infrequent? Counsel
16 has made a representation that the records don't exist. You
17 have an opportunity to explore that at depositions. I'm
18 directing the defendant to produce the record retention policy
19 -- written record retention policy regarding discipline
20 records.

21 MR. FRIEDMAN: Okay. That's fair.

22 THE COURT: If they represent it doesn't exist, you
23 have the opportunity to explore that at deposition.

24 MR. FRIEDMAN: Thank you.

25 THE COURT: M; Page 7. What's that issue, Ms.

1 Shelton?

2 MS. SHELTON: I'm sorry, Your Honor, if you could
3 just give me one second.

4 (Pause)

5 MS. SHELTON: Plaintiff was seeking that defendant
6 produce, in electronic format, all documents describing or
7 representing -- or concerning the time and attendance records
8 for contractors and employees identified in the work log for
9 ACX-20, the group in which plaintiff worked, for the period
10 September 2003 through April 2004.

11 THE COURT: And what's the relevance of this, Mr.
12 Friedman?

13 MR. FRIEDMAN: As is set forth in the records,
14 plaintiff has asserted that the information sought will show
15 that Gary Albert approved time for contract employees, and Bob
16 Lynn approved time for a contract and FAA employees, including
17 overtime, in violation of the FAA policy, and that the agency
18 used this alleged violation committed by plaintiff to justify
19 his termination.

20 THE COURT: So, is it your position that other
21 similarly situated employees were treated differently from your
22 client?

23 MR. FRIEDMAN: Yes, and also the fact that there was
24 a policy in place, and the policy was enforced against my
25 client alone and no one else.

1 THE COURT: Do you have that policy?

2 MR. FRIEDMAN: Do I have a copy of the --

3 THE COURT: Is it a written policy?

4 MR. FRIEDMAN: The management officials testified
5 that there was a policy. And I'm assuming that there is a
6 written policy, and management is enforcing --

7 THE COURT: Can you identify specific instances when
8 this happened?

9 MR. FRIEDMAN: That is the purpose of seeking the
10 information.

11 THE COURT: Sounds like a fishing expedition. Can
12 you identify specific instances when this happened?

13 MR. FRIEDMAN: Yes. Mr. Omogbehin would testify that
14 he has knowledge, without having the hard evidence, that Bob
15 Lynn approved the time and attendance for FAA employees and
16 that Gary Albert approved time and attendance --

17 THE COURT: That's very general. I need more
18 specifics. Can you identify a person, a time, a date?

19 MR. FRIEDMAN: Without being able to get the
20 documents from the FAA he would not have specific recall.

21 THE COURT: Have you deposed Mr. Albert or Mr. Lynn
22 yet?

23 MR. FRIEDMAN: Not on any of the substantive issues.

24 THE COURT: Okay. My ruling is that this request, M,
25 is denied without prejudice. That after the plaintiff deposes

1 Mr. Albert and Mr. Lynn I'll entertain a request for specific
2 information if there's some specificity to the request. But,
3 I'm not going to order the production of this significant
4 information so that plaintiffs can fish through it to identify
5 instances that they believe might support their claim. Next,
6 N. So, M is denied without prejudice. Plaintiff can make an
7 application after the depositions of Albert and Lynn. What is
8 the issue in N, Ms. Shelton?

9 MS. SHELTON: N, regards request for production
10 Number 17 which sought all documents including e-mails which
11 concern, reflect or summarize communications by and between
12 Shelly Yak and any employees of Human Resources, including but
13 not limited to, Thomas Christian, Alan Cannazarro, Cindy Kaiser
14 Ellis or Ron Smith concerning Stephen Omogbehin for a
15 particular period.

16 THE COURT: Well, we can't contest the relevancy of
17 that, can we?

18 MS. SHELTON: No, Your Honor, this is -- and it's our
19 position that these had been produced in response to other
20 requests.

21 THE COURT: Okay. Mr. Friedman, is there an
22 objection here? There's no question that any document or
23 e-mail regarding the plaintiff has to be produced. No question
24 about that. What is the objection here?

25 MR. FRIEDMAN: The objection is that they have not

1 responded to this specific request. It is a very narrowly
2 drawn request and it asked for specific documentary information
3 relating to Mr. Omogbehin's claims and defenses.

4 THE COURT: They've represented that they've produced
5 whatever they have on the plaintiff. What else could they do?

6 MR. FRIEDMAN: Your Honor, I don't believe that they
7 could just dump everything and say, we have produced everything
8 therefore you cannot ask specific questions and you cannot ask
9 for specific documents.

10 THE COURT: Okay. So, you would like plaintiff to
11 specifically identify which documents were produced in response
12 to request Number 17?

13 MR. FRIEDMAN: Yes.

14 MS. SHELTON: Your Honor, defendant produced a CD of
15 all of Shelly Yak's e-mail in response to this which would
16 include e-mails from her or between her and these people from
17 HR regarding Stephen Omogbehin.

18 THE COURT: So, can you just supplement your answer
19 to N, and just identify the information that Mr. Friedman's
20 looking for, what documents you produced that are responsive to
21 N, and that should suffice. What's the issue in O on Page 7?

22 MS. SHELTON: This involves a request for production
23 Number 18.

24 THE COURT: Is this a backup tape issue?

25 MS. SHELTON: Your Honor, request for production 18,

1 again, like the prior request they're seeking all documents
2 including e-mails about communications between Shelly Yak and
3 employees of certain entities. And because we had produced all
4 of the e-mails of Shelly Yak we believe that production to have
5 been complete.

6 THE COURT: What is the problem with O, Mr. Friedman?

7 MR. FRIEDMAN: It assumes a fact not in evidence.
8 When Ms. Shelton said we have produced all of the e-mails, what
9 e-mails have been produced, through what method?

10 THE COURT: I don't understand. I don't understand
11 what the objection is to O.

12 MR. FRIEDMAN: We contend that all of the e-mails
13 have not been produced and that the agency has not specified
14 what e-mails have been produced and how the agency was able to
15 confirm that that constituted all of the e-mails of Shelly Yak.

16 MS. SHELTON: Your Honor, those were the subjects of
17 the depositions we just took.

18 THE COURT: I would assume so; the completeness of
19 the production.

20 MR. FRIEDMAN: The completeness of the productions of
21 e-mails of Shelly Yak?

22 THE COURT: Didn't you cover that at the depositions
23 that were taken?

24 MR. FRIEDMAN: There was a deposition of the
25 individual who had done some transfer of information from a

1 backup tape onto CDs. And I wanted to establish what he did
2 and how he did it. The CDs that we got had gaping holes in
3 terms of chronological information.

4 THE COURT: Tell me specifically what your objection
5 is to the answer to O.

6 MR. FRIEDMAN: The agency has not been responsive.
7 Ms. Shelton said that we had produced it, and if she can
8 identify --

9 THE COURT: So, is your -- hold on. Is your
10 objection you think they haven't produced all the responsive
11 documents?

12 MR. FRIEDMAN: My objection is, they haven't stated
13 what they have produced.

14 THE COURT: Okay. Just like N, the defendant is
15 directed to supplement its answer to Number 18 to identify the
16 responsive documents they produced. P; Page 8. What's the
17 issue, Ms. Shelton?

18 MS. SHELTON: Your Honor, P regards request for
19 production Number 19 in which plaintiff sought that defendant
20 produce in electronic format the e-mail file known as the
21 names.nsf. This is the Lotus Notes file for Thomas Christian,
22 Alan Cannazarro, Ron Smith, and Cindy Kaiser Ellis.

23 THE COURT: Is this relevant to the backup tape
24 issue, Mr. Friedman?

25 MR. FRIEDMAN: The backup tape -- every request for

1 information seeking the electronic document is relevant to the
2 backup tape issue. But, the backup tape issue in and of itself
3 doesn't encompass all of the information that we're seeking.
4 And I don't want to make it sound as though we're asking for
5 information that's incredibly burdensome. A backup tape is one
6 physical document. There are other areas within --

7 THE COURT: Tell me -- I want to focus on P. What is
8 the objection to P, request Number 19? That's what we're
9 talking about.

10 MR. FRIEDMAN: This information is contained in --

11 THE COURT: What are you asking for? I don't have
12 the request in front of me. What are you asking for?

13 MR. FRIEDMAN: Oh. Okay. Produce in electronic
14 format the e-mail file known as names.nsf file in Lotus Notes
15 for Thomas Christian, Alan Cannazarro, Ron Smith, and Cindy
16 Kaiser Ellis --

17 THE COURT: These are employees of the FAA?

18 MR. FRIEDMAN: Yes.

19 THE COURT: And you're not limiting it to just
20 information regarding your client, you want everything from
21 their files?

22 MR. FRIEDMAN: These are Human Resources people.

23 THE COURT: Okay. You want information that's not
24 related to your client, right?

25 MR. FRIEDMAN: We are not interested in information

1 that is not related to my client.

2 THE COURT: From these files, Ms. Shelton, has the
3 defendant produced the information that pertains to the
4 plaintiff?

5 MS. SHELTON: Yes, Your Honor, we both --

6 THE COURT: Okay.

7 MS. SHELTON: -- produced the e-mails --

8 THE COURT: End of story. Objection is overruled.
9 Let's go on to Q. What is the issue in Q?

10 MR. FRIEDMAN: Your Honor, may I be heard after her
11 response?

12 THE COURT: Mr. Friedman, I've said time and time
13 again, I make a ruling, I'm not going backwards. We're going
14 forward. What's the issue in Q, Ms. Shelton?

15 MS. SHELTON: This is a request -- regards a request
16 for production Number 20. Request for production Number 20
17 requests that defendant produce copies of the specific backup
18 tape used to obtain all electronic information supplied to
19 plaintiff in response to plaintiff's interrogatories to
20 defendant.

21 THE COURT: Objection overruled. Irrelevant,
22 burdensome, cumulative. What's the issue in S? Did we miss R?
23 Looks like we missed R. S, on Page 9.

24 MS. SHELTON: As regards request for production
25 Number 21 I believe request for 21 had to do with the location

1 records of certain security guards which has subsequently been
2 produced. I believe that's moot, but if plaintiff's not
3 satisfied --

4 THE COURT: Is that moot now, Mr. Friedman, request
5 21?

6 MR. FRIEDMAN: If the agency has answered it. The
7 agency's answer was none. Now I got some information as to the
8 identity of a security person who was there on the day of Mr.
9 Omogbehin's termination, but I don't know if there are any
10 documents that are responsive to this request. The agency's
11 answer as it stands on the agency's response was none.

12 MS. SHELTON: Subsequent to that, and in preparation
13 of this letter I believe that we both discussed, and I believe
14 that I produced the location record, which is what you were
15 looking for, for the security guard -- for all the security
16 guards that day which would reflect which one had escorted Mr.
17 Omogbehin from the property. I'm not sure what more he's
18 seeking. I'm happy to oblige, but I do believe that this --
19 that there's no relevance to this line.

20 THE COURT: What do you want, Mr. Friedman that you
21 didn't get?

22 MR. FRIEDMAN: Any documents prepared by security
23 personnel, including security logs which describe, depict,
24 reflect, summarize or relate to the events surrounding
25 plaintiff's termination on April 23rd.

1 THE COURT: Well, that's easy. If there's any
2 security records regarding the plaintiff, they're relevant and
3 they have to be produced. That's not difficult. It couldn't
4 be clearer that any document concerning the plaintiff has to be
5 produced. Okay. T; what's the issue with T, Ms. Shelton?

6 MS. SHELTON: Plaintiff wanted to know Cleave
7 Laswell's employer at the time that plaintiff was terminated,
8 and his current employer.

9 THE COURT: You didn't cover that at his deposition?

10 MR. FRIEDMAN: Yes. That was covered.

11 THE COURT: So, that's moot?

12 MR. FRIEDMAN: And also the employer Craig Rummer,
13 and a copy of the location records.

14 MS. SHELTON: Craig Rummer is the security guard,
15 Dennis?

16 MR. FRIEDMAN: Yes. Yes, he is.

17 MS. SHELTON: Craig Rummer is the security guard.
18 Your Honor, this was the first request that we had that they
19 wanted the employer of Craig Rummer. It wasn't identified
20 specifically in the initial interrogatory. And he wanted a
21 copy of the location records; that is, the security guard
22 location records which we have produced.

23 THE COURT: Who's Mr. Rummer?

24 MS. SHELTON: Craig Rummer, I believe, is the
25 security guard. Is that correct?

1 MR. FRIEDMAN: I think he was.

2 THE COURT: So, is there a dispute now? Have you
3 worked this out?

4 MS. SHELTON: I don't know. Is there something more
5 that you're --

6 MR. FRIEDMAN: Do we have his employer?

7 THE COURT: His current employer, Mr. Rummer?

8 MR. FRIEDMAN: At the time he was employed.

9 THE COURT: Oh, you mean he was -- was he working for
10 a private company?

11 MR. FRIEDMAN: Yes.

12 THE COURT: That has to be identified. If it hasn't
13 been, his employer has to be identified. Okay. That takes us
14 through the letter, correct?

15 MR. FRIEDMAN: Yes.

16 THE COURT: All right. Mr. Friedman, file your
17 motion to compel regarding the backup tape issue by March 17th.

18 MR. FRIEDMAN: Your Honor, we have -- in regard to
19 the spoliation issue Ms. Shelton and I -- or I have identified
20 approximately seven or eight other people that I wanted to
21 depose just to provide the Court with additional information to
22 support the spoliation motion. I had anticipated that all
23 seven or eight would take one day. It could possibly spill
24 into a second day. And I probably, based on a very brief
25 vacation that I'm taking at the end of next week, I probably

1 would not be able to schedule something until the latter part
2 of the first week in March or the second week in March.

3 THE COURT: Ms. Shelton, are you objecting to those
4 depositions?

5 MS. SHELTON: Your Honor, I'm not clear. The seven
6 or eight people that he intends to depose, he wants for the
7 purposes of a spoliation motion. And I believe what the Court
8 had ordered was that plaintiff could file a motion to compel
9 the production of the backup tapes.

10 THE COURT: Correct.

11 MS. SHELTON: And they're two different issues.

12 THE COURT: Are you going to object to Mr. Friedman's
13 request to take seven or eight depositions on spoliation
14 issues? Have you identified for Ms. Shelton who you want to
15 depose and the purpose of the depositions?

16 MR. FRIEDMAN: Yes. The specific purpose which she
17 had asked for and I relayed to her was the knowledge of these
18 individuals of Mr. Omogbehin's initial request for information,
19 their involvement in preserving the information, and their
20 involvement in obtaining the information requested. So, it
21 goes --

22 THE COURT: Haven't you -- has that issue already
23 been addressed at the depositions?

24 MR. FRIEDMAN: There was a deposition of three
25 individuals. We are dealing with a request that Mr. Omogbehin

1 made after he was terminated which request went to a number of
2 different people.

3 THE COURT: Ms. Shelton, are you objecting to these
4 depositions?

5 MS. SHELTON: I would object to that these
6 depositions occur before March 17. I don't think that they're
7 necessary to file the motion to compel. I think if the Court
8 -- it would be appropriate for there to be a ruling on whether
9 or not we've met our production burden before or have had an
10 opportunity for the Court to rule as to whether or not we've
11 produced this stuff or how it's been produced before a motion
12 to -- for spoliation is filed. So, at this time I would object
13 to the need for these depositions to happen prior to the motion
14 to compel because plaintiff already has very firm beliefs about
15 what he thinks hasn't been produced and what he thinks should
16 be produced, and that is the backup tape.

17 THE COURT: The Court agrees. The Court agrees that
18 until we get through the production it's premature for the
19 plaintiff to file a spoliation motion. So, that the request to
20 take these seven or eight depositions is denied without
21 prejudice at this time. Plaintiff will file its motion. You
22 say you can't get it filed by March 17th?

23 MR. FRIEDMAN: Your Honor, may I please be heard just
24 to respond to what Ms. Shelton had said? Thank you. It's not
25 only to file a spoliation motion, but in the course of

1 discovery the first broad base approach that I use, which may
2 be improper, it may not be what other attorneys do, but I want
3 to know what information is available, through what sources,
4 and who is in control, and in possession of those sources of
5 information. That is the purpose of questioning these people,
6 especially as it concerns their knowledge of the information
7 that had been requested at the time Mr. Omogbehin was
8 terminated, and their specific efforts to either acquire that
9 information or to keep it in their possession and control.

10 MS. SHELTON: Your Honor --

11 THE COURT: I've heard enough argument on this issue.
12 The Court determines that at this time it will bar plaintiffs
13 from taking the seven or eight depositions on the issues that
14 Mr. Friedman has identified. The Court believes it's
15 appropriate to complete defendant's production before we get to
16 these issues. The request for the depositions is denied
17 without prejudice. We can talk about taking the depositions at
18 another time.

19 We're going to get this motion filed, we're going to
20 have oral argument on the motion. At that conference we're
21 going to set a discovery schedule on the case. It's time that
22 we turn from focusing on the minutia of these technical
23 computer issues that we get to the merits of the issues.

24 I can tell you, Mr. Friedman, with confidence,
25 because I tell litigants in every case, if it turns out that

1 your client does not have information at a deposition that is
2 subsequently produced, your client will not be prejudiced. You
3 will be given the right to question the witness about
4 subsequently produced information. But, it's time to get to
5 the merits of this case. If you tell me you can't file your
6 motion to compel on the backup issue by March 17, March 24 that
7 motion has to be filed.

8 I'll schedule oral argument on the motion. I'll put
9 in my order that I want to hear from plaintiff before that
10 conference the identity of every witness that the plaintiff
11 wants to depose. At that conference we'll get a final schedule
12 for fact depositions in the case from both sides. The Court's
13 limit of ten depositions stays absent good cause. The Court
14 has not seen good cause yet to exceed the ten deposition limit
15 in the case. Anything else, Mr. Friedman?

16 MR. FRIEDMAN: Yes. One very brief comment, that was
17 the representation of the U.S. Attorney at the first conference
18 in June of 2007 was that they would produce the backup tape.
19 Number 2, in terms of another issue, the audio tape issue. Mr.
20 Omogbehin had asked for a voice mail tape. The agency
21 indicated that it would go through a tremendous expense in
22 order to extract the audio information from a voice mail tape
23 because the system that had been in place at the time the
24 voice mail tape was created was no longer the operating
25 software system that the agency used. So we had asked for a

1 copy of the tape so that we could extract that. The agency
2 represented that the cost of extraction would be thousands of
3 dollars --

4 THE COURT: What do you want, Mr. Friedman?

5 MR. FRIEDMAN: We want the audiotape.

6 THE COURT: Ms. Shelton, can the audiotape be
7 produced, or has it been produced?

8 MR. FRIEDMAN: No, it has not been --

9 THE COURT: Let me ask the Government.

10 MS. SHELTON: Your Honor, no. And I believe that
11 this issue -- this was a conference that was held prior to my
12 taking over the case. And my understanding of the minutes from
13 that conference were that the defendant's prior counsel had
14 represented that because the system was no longer available
15 we'd have to hire a contractor and they agreed to do it and
16 incur the expense to do that. And so that was done and those
17 voice mails that were recovered were produced on disk in wave
18 format to plaintiff.

19 THE COURT: So, what do you want, Mr. Friedman, if you
20 have that?

21 MR. FRIEDMAN: The same issue and it deals, Your
22 Honor, with representations that have been made by opposing
23 side. Now, let me give you an example, please. In June of
24 2007 Mr. Aftab, the Assistant U.S. Attorney represented to you
25 that it was difficult to extract from the backup files the

1 electronic versions of e-mails for various people. And he
2 represented to the courts that it would take 80 hours to do
3 that function because what was necessary was that there needed
4 to be efforts to go into the various files in the backup tapes
5 and to perform whatever needed to be performed. The witness
6 who was deposed stated that it took an hour and a half to two
7 hours to get all of the electronic information. That was a --
8 obviously a representation that did not appear to be accurate.

9 MS. SHELTON: Your Honor, at best --

10 THE COURT: Mr. Friedman, all I want to know is, what
11 do you want?

12 MR. FRIEDMAN: We want the actual tape. Mr.
13 Omogbehin contends that there were voice mail messages that he
14 --

15 THE COURT: Okay. So, this relates to sort of the
16 backup tape issue, but now we're talking about voice mails
17 instead of e-mails.

18 MR. FRIEDMAN: Yes.

19 THE COURT: Include it in your motion. Anything
20 else? Anything else for the Government?

21 MS. SHELTON: Your Honor, I'm just curious. When
22 will the motion to compel -- when will the hearing on the
23 motion to compel the oral argument be held, only because I have
24 a trial?

25 THE COURT: I don't have a specific date now, but I

1 will -- how much time will you reasonably need to respond to
2 the motion?

3 MS. SHELTON: It's going to depend on when the
4 hearing is, Your Honor. I have a trial that begins April 1st
5 that will be a week long. That's going to take up,
6 unfortunately, most of March to prepare for.

7 THE COURT: I'm going to give you 30 days to respond
8 to the motion. Respond by April 4 -- April 24. I didn't mean
9 to get you nervous. And we'll get together in early April.
10 Okay. Any other issues?

11 MR. FRIEDMAN: Not at this time.

12 THE COURT: Thank you, counsel. We're adjourned.

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C E R T I F I C A T I O N

We, PAT REPKO and KIMBERLY UPSHUR, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Pat Repko

DATE: May 1, 2009

PAT REPKO

/s/ Kimberly Upshur

KIMBERLY UPSHUR

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